

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID ROMERO,

COMPLAINANT,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD OF AGRICULTURE,
COLORADO STATE UNIVERSITY,

RESPONDENT.

Hearing was held on October 12, 1999 and November 30, 1999 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Cristina Valencia, Assistant Attorney General. Complainant was represented by Lee E. Christian, Attorney at Law.

Complainant testified on his own behalf and called as witnesses Thomas Parker, Trades Maintenance Manager; Raule Salazar, Maintenance Trades Assistant; and Eppie Martinez, former Plumber II, Colorado State University.

Respondent called four witnesses: Gerry Bomotti, Vice-President of Administrative Services; Thomas Parker; Dana Hiatt, Director of Office of Equal Opportunity; and William Liley, Director of Human Resources, Colorado State University.

Complainant's Exhibits A through BB were admitted into evidence by stipulation of the parties. Respondent's Exhibits 1 through 34 were also admitted by stipulation. Complainant bore the burden of proof. The witnesses were not sequestered.

MATTER APPEALED

Complainant appeals the denial of a grievance alleging that respondent did not follow its own policies in denying his promotion. For the reasons set forth below, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether respondent violated its internal policy in filling the Plumber II position, and if so, whether it did so in a racially discriminatory manner;
3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

By Order dated July 23, 1999, the State Personnel Board rejected the Preliminary Recommendation of the Administrative Law Judge and granted complainant's petition for hearing as follows: "The Board finds that there are valid issues which merit a hearing, particularly respondent's motivation for deciding to fill the position with an open-competitive examination rather than promoting from within."

The issue of whether respondent was required to provide a written explanation for not hiring a minority candidate was barred from consideration in the Preliminary Recommendation because the issue was raised for the first time at Step 4 of the grievance process, in contravention of Rule R10-2-1(A), 4 Code Colo. Reg. 801-1. Because complainant did not respond to the Board's Request for Clarification, the discrimination issue was limited to: "whether respondent violated its internal policy in filling the Plumber II position, and, if so, whether it did so in a racially discriminatory manner," and not discrimination on the basis of failure to promote.

FINDINGS OF FACT

1. Complainant David E. Romero was first employed by respondent Colorado State University (CSU) in March 1987 as a plumber in the Facilities Management Department. On January 1, 1988, Romero voluntarily demoted to Plumber Maintenance Mechanic and on April 1, 1989 was promoted to Plumber. He voluntarily demoted to General Building Trades Assistant on March 1, 1994. The reason for allowing Romero to voluntarily demote was that he had lost his driver's license as the result of convictions for driving under the influence (DUI) and the position of Plumber requires a valid Colorado driver's license.

2. Romero was promoted to Plumber I on March 1, 1995. His employment was terminated in early 1996 because of another DUI conviction and the consequent loss of his driver's license. He appealed his dismissal to the State Personnel Board and in August was reinstated to the lower position of General Building Trades Assistant pursuant to the terms of a settlement agreement. In March 1998, Romero was promoted to Pipe/Mechanic Trades Assistant, one level below Plumber. (See Exh. R.) This is the

position he held at the time of the Plumber II vacancy which is the subject of the grievance leading to this action.

3. Eppie Martinez, Plumber II, was the supervisor of the plumbing shop and Romero's direct supervisor from July 1994 until January 1998, when he was dismissed from employment for alleged insubordination.

4. Tom Parker, Trades Maintenance Manager and the supervisor of Martinez, had the primary responsibility for filling the vacant Plumber II position. Romero made it known to Parker that he was interested in applying for the Plumber II position and asked to be named the Interim Plumber II so as to gain experience in the position.

5. Parker denied Romero the opportunity to serve as Interim Plumber II because Romero would be working outside of his job description for Pipe/Mechanic Trades Assistant. He advised Romero that he was not precluded from applying for the position. Parker felt that only a Plumber I could act in the capacity of Plumber II. There were three Plumber Is available, inclusive of one Hispanic, and they shared the Interim Plumber II duties until the vacant position was filled. Romero's allegation of retaliation stems from not being selected as interim Plumber II.

6. The minimum qualifications of the Plumber II position were advertised as follows:

Six years plumbing experience, two of which must be at the journey level which includes performing lead work/supervision over subordinate trade workers for at least twelve months. A Masters plumbing license and a valid State of Colorado driver's license (Class C) is also required.

Applicant must be willing and able to to Complete Cross Connection pool and spa training and successfully pass a certification test within one year of employment date (training paid for by CSU). Position must be available for emergency call-back on evenings/weekends and will be responsible for receiving after hour calls (1 hour max response time).

Highly Desirable: PC experience in the use of computerized Maintenance Manager Systems.

Exhibit 15 (underscoring in original).

7. The Plumber II position could be filled through an open competitive process or a promotional process. Open competitive examinations are open to all state residents who meet the general requirements for that class of work. Promotional examinations are open only to University employees who meet the general requirements for the position classification and who presently occupy a University state classified personnel position or who are on a reemployment list. The promotional exam could be CSU promotional or state promotional, which includes all state classified employees.

8. The Facilities Management Policies and Procedures Manual, Policy Regarding Promotions and Reassignments, issued in October 1995 and the subject of this

litigation, provides:

It is the Intent of Facilities Management (Facilities) to fill positions from within the department to the extent that such action is consistent with State and Federal Laws, the University Diversity Plan and our ability to obtain the desired qualifications. Toward that end it is also the intent of Facilities to encourage and assist its interested employees in obtaining the knowledge, skills, and abilities necessary to qualify for higher level positions when doing so does not interfere with the efficient and timely completion of the mission of facilities and is also consistent with the University Diversity Plan and applicable civil rights and accessibility laws (both State and Federal). It shall, therefore, be the policy of Facilities to:

- 1) whenever possible, promote from within when the available "in house pool" of candidates is qualified for the job and is sufficiently diverse
- 2) develop on the job training opportunities for employees when the needs of the University permit and motivated and capable employees are willing to make the effort
- 3) encourage other career development activities to the extent practical
- 4) establish procedures (including review of job selections by the University Office of Equal Opportunity (OEO) prior to announcement) which assure open and equal access to promotional and training opportunities.

Exhibit 16.

9. An introductory memorandum to this Facilities Management Promotion/Reassignment Policy states:

Probably the biggest single area of change in this new policy is in the area of diversity. I want to point out that "in house" candidates for an open position or training opportunity will continue to have the opportunity to apply. The concept of diversity simply means that the pool of applicants should be made up of more than white males if potentially qualified applicants of other groups are reasonably available at a wider "search area." It does not mean that we must promote an unqualified individual based on race, sex or creed. In short, we are attempting to level the playing field for all concerned.

Exhibit 16 (underscoring in original).

10. John Morris, Manager of Facilities Operations, and Parker together decided to utilize an open competitive examination to fill the Plumber II vacancy because they felt that the in-house pool of qualified applicants was not "sufficiently diverse," which is not defined in the University plan, and that an open competitive exam was the best way to obtain the broadest, most diverse group of applicants, inclusive of women, African Americans and Native Americans. The de facto policy of the University is to use the open

competitive process in order to get the most diverse pool. Historically, there has been a lack of diversity in the plumbing shop.

11. The plumbing shop has a history of tension between Anglos and Hispanics. Romero registered several complaints over racial jokes and ethnic slurs occurring in the shop, as well as perceived unfair treatment of Hispanics, notably himself.

12. When Martinez, who is Hispanic, was the shop supervisor, there was a perception by some that he showed favoritism towards Romero in the assignment of duties.

13. When complainant began his employment with respondent in 1987, he was the only Hispanic in the plumbing shop.

14. Parker received three referrals from the human services office to go with the transfer applicants, Romero being one. After interviewing the six, Parker arrived at three finalists, inclusive of two transfer applicants and one applicant from the open examination process. One of the three finalists was Romero. The other two finalists were Anglo males.

15. The three finalists were each interviewed by the four remaining staff members of the plumbing shop, three of whom were Hispanic, two of the regular staff members being candidates for the job. Romero was rated third by the staff. The candidate who was ultimately successful was rated second. All three were qualified for the position. (See resumes, Exhs. 17, 18, 19.) The staff interview was weighted 25% of the overall rating.

16. Parker did not select either of the two transfer applicants because he believed that the other was stronger and more experienced in the areas of fiscal management, business and training planning, hiring, firing and disciplining employees, assigning leave, ability to develop a team and to develop a cohesive work unit. He did not make the decision based upon the person he thought was the best plumber. He was particularly interested in supervisory experience.

17. In compliance with the Facilities Management Promotion/Reassignment Policy, after making his final selection but before extending an employment offer, Parker contacted Dana Hiatt, Director of the CSU Office of Equal Opportunity, to review and approve the hiring process, which she did. A written justification for not hiring a minority candidate is not required for state classified positions but is for faculty members. It is not the intent of the diversity plan to promote a lesser qualified applicant over another. Hiatt agreed with the decision to utilize the open competitive testing process.

18. On June 15, 1998, Romero filed a grievance over his nonselection, alleging: "In violation of the Facilities Management promotion/reassignment policy an outside candidate was interviewed - hired. Mr. Romero believes that this action was discriminatory based on race and retaliation for ongoing discrimination allegations - investigations." (Exh. 3.) The grievance was denied at Step 4.

19. There are no allegations of wrongdoing in the grievance process. Complainant David Romero filed a timely appeal with the State Personnel Board on September 17, 1998.

20. The remedy Romero requested at hearing is that the discrimination stop and he be reimbursed his costs and attorney fees.

DISCUSSION

I.

This is an appeal of an administrative action. Unlike a disciplinary case, the burden of proof by a preponderance of the evidence rests with complainant to show that respondent's action was arbitrary, capricious or contrary to rule or law. See Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); s. 24-50-103(6), C.R.S. Complainant also carries the burden to prove discrimination based on race.

Complainant argues that the University violated its policy of hiring from within by not promoting him to the position of Plumber II. He seems to contend that his status as a qualified minority applicant compelled respondent to place him in the position pursuant to the Facilities Management Promotion/Reassignment Policy. He submits as evidence of respondent not following its own policy the fact that he did not gain the promotion. He believes that he was retaliated against for past complaints and allegations of discrimination. He believes he should have been selected to fill the vacancy because he is Hispanic as well as the most qualified applicant. Complainant did not set forth the applicable law he relies on to support his argument that respondent applied its internal policy in a discriminatory and retaliatory manner.

Respondent contends that complainant did not present any evidence about the grievance and the case issue is whether the Step 4 denial of the grievance was arbitrary, capricious or contrary to rule or law. Respondent argues that the internal policy does not require that an Hispanic applicant necessarily be hired, and the hiring process was reviewed and approved by the University Office of Equal Opportunity prior to an offer of employment. Respondent argues that complainant failed to show a case of intentional discrimination and that it "bent over backwards" to keep complainant in its employ despite three DUI convictions, and promoting him back to Plumber after allowing him to voluntarily demote in order to keep his job.

II.

No one seems to dispute that there has been some racial tension among the staff members of the plumbing shop. Yet this does not translate into unlawful discrimination on the part of management. Complainant's prior supervisor was Hispanic, and several Hispanics have joined him in the department since he began. He testified that the shop interview was unfair because some of the other staff members were new and did not know him very well, yet the same was certainly true of the other applicants, especially the

"outside" applicant. When complainant argues that the agency violated its own policy, he is advocating his own interpretation of the diversity plan, that is, the University was required to promote him and provide training in areas where his qualifications were inferior, such as supervision.

Complainant insists he was the most qualified of the three applicants, apparently trying to persuade the State Personnel Board to agree with him. However, it is not within the purview of the Board to decide which of the three applicants was the most qualified. Complainant was among the three finalists, and it is within the discretion of the agency to select the person best suited for the position. There has been no showing of an agency abuse of discretion here. Respondent articulated legitimate business reasons for the hiring decision, reasons founded in its knowledge and expertise of the needs and best interests of the Facilities Management Department. Complainant presented insufficient evidence to demonstrate that the business reasons were a pretext for discrimination or that respondent failed to follow its internal policy and for discriminatory or retaliatory reasons. Complainant's case is essentially a case of his own perceptions and unfounded speculation.

Complainant's legal burden was to produce evidence demonstrating that it is more likely than not that respondent violated its policy in a racially discriminatory manner. The relevant evidence was whether respondent honestly believed its reasons for acting as it did and acted in good faith. Whether respondent's reasons were wise is irrelevant. As long as the decision was not based on unlawful criteria, an employer does not commit unlawful discrimination by choosing between equally qualified candidates. To find unlawful discrimination, it must be found that the disparity in qualifications was "overwhelming." See Bullington v. United Airlines, Inc., 1999 WL 606880 (10th Cir. 1999).

In order to prove that respondent's denial of complainant's grievance was arbitrary, capricious or contrary to rule or law, complainant had to show that, considering all the evidence in the record, a reasonable person would fairly and honestly be compelled to reach a different conclusion. If not, no abuse of agency discretion has occurred and the agency decision must be upheld. See Ramseyer v. Colorado Department of Social Services, 895 P.2d 1188 (Colo. App. 1995). It is not within the province of the Administrative Law Judge or the State Personnel Board to operate or second-guess the agency in the making of these decisions. Hughes v. Department of Higher Education, 934 P.2d 891, 896 (Colo. App. 1997).

This record cannot sustain a conclusion that respondent's action was arbitrary, capricious or contrary to rule or law or that respondent violated its internal policy in a racially discriminatory manner in filling the Plumber II position. Neither party presented a case that merits an award of costs and attorney fees. See s. 24-50-125.5, C.R.S.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. Respondent did not violate its internal policy in filling the Plumber II position.
3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this 10th day
of January, 2000, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of January, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the U.S. mail, postage prepaid, addressed as follows:

Lee E. Christian
Attorney at Law
401 West Oak Street
Fort Collins, CO 80521

and in the interagency mail, addressed as follows:

Cristina Valencia
Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, 5th Floor
Denver, CO 80203